United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1020

To be argued by:
ROBERT S. HAMMER

United States Court of Appeals
FOR THE SECOND CIRCUIT

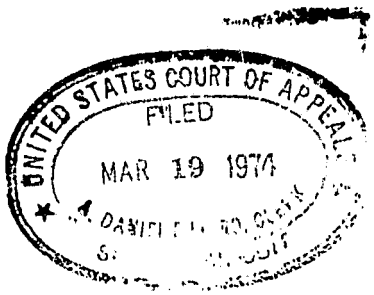
UNITED STATES OF AMERICA ex rel. OSCAR LEE CHENNAULT,
Petitioner-Appellee,

against

HAROLD J. SMITH, Warden, Attica Correctional Facility, et al.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants
Office & P.O. Address
Two World Trade Center
New York, N. Y. 10047
Tel. No. 488-3394

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

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Questions Presented

1. Should petitioner's admissions relating to a check stolen by him have been excluded by the State trial court as "fruit of the poisonous tree" because they were elicited from him partially through the use of illegally obtained evidence?

2. Assuming, *arguendo,* that question "1" is answered in the affirmative, was the failure to exclude these admissions harmless error?

Statement of the Case

This is an appeal from a judgment of the United States District Court for the Eastern District of New York, Hon. Edward R. Neaher, District Judge, entered October 30, 1973, granting petitioner's application for a writ of habeas corpus (43a).*

On April 9, 1964, after a jury trial in Supreme Court, Queens County (Hon. Albert H. Bosch, J.), petitioner was convicted of grand larceny, first degree, in the theft of a bank deposit bag containing checks and cash from the office of Montauk Freightways. A sentence of five to ten years imprisonment was imposed by Justice Bosch on May 21, 1964. The conviction was affirmed by the Appellate Division, without opinion, *People* v. *Chennault,* 25 A D 2d 718 (2d Dep't 1966) and by the Court of Appeals, 20 N Y 2d 518 (1967) (two judges dissenting), subject to a "Huntley" hearing to determine the voluntariness of certain inculpatory statements made by petitioner to the police, 20 N Y 2d at 521-522. This hearing was duly held and the trial court found for the People. The Appellate Division again affirmed, without opinion, *People* v. *Chennault,* 32 A D 2d 893 (2d Dep't 1969).

There can be no doubt that petitioner was guilty of the larceny charged to him. The office manager of Montauk Freightways identified petitioner at the trial as the person who, dressed as a minister, had unsuccessfully solicited a contribution for his "church" (Tr 10-12, 32-33),* moments before the theft occurred (Tr 14). Petitioner left as the

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* Numbers in parentheses followed by "a" refer to pages of the appendix.

* Numbers in parentheses preceded by "Tr" refer to the transcript of the trial held April 8-9, 1964. When preceded by "SH," numbers refer to the transcript of the pre-trial suppression hearing of April 7, 1964.

mailman was arriving but was observed returning immediately to the office (Tr 12-14).

The bookkeeper testified as to how, at about that time, she had prepared the bank deposit, inserted it in a canvas bank bag and placed it on top of a cabinet in her office (Tr 39-41). Petitioner had passed the cabinet on his way to see the office manager and on his way out the door, where he was observed leaving and immediately returning, just as the mailman arrived (Tr 41). No other visitor entered or left that part of the office from that time until the deposit bag was discovered missing, a short while after petitioner had left (Tr 30, 42, 50).

Petitioner was apprehended in a Brooklyn hotel a few hours after the theft had been discovered. The police had been called to the scene by the hotel clerk who thought that an attempted burglary was in progress and that she had identified petitioner as the person who had recently attempted to rob her (Tr 94, SH, 7, 16-17). This identification later proved to be faulty. While the investigating officer was speaking to the clerk, petitioner called to someone in a washroom adjoining the lobby (SH, 22-24). A search of the washroom revealed another man. The officer also found a check drawn to cash on the account of Montauk Freightways (Tr 95, SH, 15, 25-26). A partner of that firm identified the check as one he had drawn the night before the theft, the proceeds of which were to be used for petty cash (Tr 34-35), and had been placed in the bank bag found to have been stolen (Tr 39).

Petitioner and the man in the washroom were taken to the 80th Precinct for investigation (Tr 96, SH, 16). A search of petitioner's car, which had been parked near the hotel, revealed a suitcase containing clerical dress and papers identifying petitioner as a minister (SH, 10-14).

Petitioner and the second, still-unidentified man in the washroom, were claimed by members of the 114th Precinct

detective squad after a call to that command confirmed that Montauk Freightways had reported a theft (Tr 74, SH, 33-34). A Detective Greene questioned petitioner about the check and the clerical clothing (Tr 66, SH, 35-37). Petitioner thereupon admitted the theft (Tr 66-67, SH, 37-38). Similar consistent testimony as to the obtaining of the check and the clothing and eliciting of these statements appears in the minutes of another suppression hearing held January 27, 1964, pp. 4-14 and the transcript of a mistrial, March 2-3, 1964, pp. 58-60.

The State Court held that the search of petitioner's car was illegal and suppressed the evidence resulting therefrom, *People* v. *Chennault, supra,* 20 N Y 2d at 520. It is also conceded that the petty cash check was lawfully seized. On this point, all the judges of the New York Court of Appeals and the District Court concur, 20 N Y 2d at 521, 523 and (33a). The issue over which the New York Court of Appeals divided and which petitioner litigated before the District Court was whether the admissions concerning the check were so entwined with those elicited by the illegally seized clothing as to require suppression of both statements, 20 N Y 2d 521, 523-24 and (35a-37a).

The instant proceeding for habeas corpus was filed while petitioner was confined at the Federal penitentiary, Atlanta, Georgia, after conviction of a federal offense while on parole from the instant conviction. Subsequently, petitioner was returned to State custody from which he was reparoled in October, 1973. Applications for a stay of the judgment herein pending appeal, were denied by both the District Court on December 21, 1973 (4a) and this Court on January 8, 1974 (one judge dissenting). The decision of the District Court has been published at 366 F. Supp. 717.

ARGUMENT

The District Court erred in granting the writ.

A.

In applying the rule that a defendant's admission may be excluded if it is "fruit of the poisonous tree," *Wong Sun* v. *United States,* 371 U.S. 471, 484-87 (1963), the District Court properly observed that the evidence so derived must have resulted "immediately" from police misconduct, *id.,* at 486 (34a-35a). It also correctly noted the not-infrequent admonition of appellate judges against an overly mechanical application of the rule, citing *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973), (Powell, J., concurring) as well as this Court's recent decision in *United States* v. *Friedland,* 441 F.2d 855, 861 (2d Cir.) *cert. den.* 404 U. S. 867 (1971) (35a). Regrettably, the District Court thereupon proceeded to a superficial analysis of the undisputed facts of this case (35a-36a); misapplied the relevant decisions and, we submit, rendered an erroneous judgment.

The doctrine that permits the introduction of otherwise tainted evidence if it is derived from an independent source is an integral part of the exclusionary rule and as old as the rule itself. *Silverthorne Lumber Co.* v. *United States,* 285 U.S. 385, 392 (1920). As the Supreme Court put it, nearly two decades later:

> Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint," *Nardone* v. *United States,* 208 U.S. 338, 341 (1939)

The viability of this doctrine has continued with undiminished force, *Alderman* v. *United States,* 394 U.S. 165, 180-181 (1969).

Judging the instant case by the standard stated by the foregoing cases as well as more recent authorities, one must conclude that petitioner's statement to Detective Greene as to how he happened to come into possession of Montauk Freightways' petty cash check passed constitutional muster for admission in evidence.

In *Gissendanner* v. *Wainwright,* 482 F.2d 1293, 1295-97 (5th Cir. 1973), two defendants accused of rape were identified by their victim in a line-up. The identity of these men became known initially through an illegally obtained confession made to police by a third defendant. Although the confession was duly suppressed, the victim's identification was permitted to stand as having been derived from an independent source.

In *Jones* v. *United States,* 413 F.2d 1150, 1151-52 (D.C. Cir. 1969) a police officer trespassed on a defendant's property in the latter's absence. Entering a garage, the officer observed a stolen car that was in the process of being stripped. Nevertheless, a search warrant was upheld on the basis of what the officer had lawfully observed through an opening in the garage door as well as the defendants' suspicious behavior during his initial approach, while on patrol. Accord, *United States* v. *Sterling,* 369 F.2d 799, 803 (3d Cir. 1966) and *Chin Kay* v. *United States,* 311 F.2d 317, 321 (9th Cir. 1962). But cf. *McCloud* v. *Bounds,* 474 F.2d 968, 970 (4th Cir. 1973).

Although this Court has held inadmissible illegally obtained evidence despite a government claim that the evidence *could* have been obtained properly, *United States* v. *Schipiani,* 414 F.2d 1262, 1266 (2d Cir. 1969) and *United States* v. *Paroutian,* 299 F.2d 486, 489 (2d Cir. 1962), it must be emphasized that these cases never presented the same situation as the instant case where the defendant's admission was stimulated by what was unquestionably the product of a lawful seizure and possibly by illegally

seized evidence as well.* To the extent that this Court's prior decisions do not entirely answer the question at bar, the weight of authority, we submit, supports the admissibility of petitioner's remarks concerning the check. This result is in harmony with the purpose of the exclusionary rule as recently pointed out by this Court: to prevent police misconduct, *United States* v. *Friedland, supra.* Since the check was obtained lawfully, no valid purpose would be served by denying its use to the prosecution, *Wong Sun* v. *United States, supra, People* v. *Chennault, supra,* 20 N Y 2d at 520-521.

B.

The District Court compounded its error by failing to consider the overwhelming evidence against petitioner, exclusive of his admissions to the police. The State trial record which the District Court had before it (29a) establishes that even if petitioner's statements to Detective Greene should not have been admitted into evidence, this was harmless beyond a reasonable doubt, *Chapman* v. *California,* 386 U.S. 18 (1967); *United States* v. *Resnick,* 483 F.2d 354 (5th Cir. 1973). As this Court has had occasion to observe, the procedural safeguards established by the Supreme Court were never intended to be "escape hatches for the guilty," *United States ex rel. Beyer* v. *Mancusi,* 436 F.2d 755, 756 (2d Cir.), *cert. den.* 403 U.S. 933 (1971).

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* The statement in *Schipiani, supra,* that evidence uncovered through both legal and illegal leads is inadmissible, derives from a District Court comment in an earlier proceeding, 289 F.Supp. at 43, 54, which erroneously analyzed this Court's decision in *Paroutain.* It is, at most, dictum.

CONCLUSION

The judgment appealed from should be reversed and the petitioner's application dismissed.

Dated: New York, N. Y., March 19, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

Three Copies received
George A Sanders
Attorney for Petitioner - Appellee
March 19, 1974